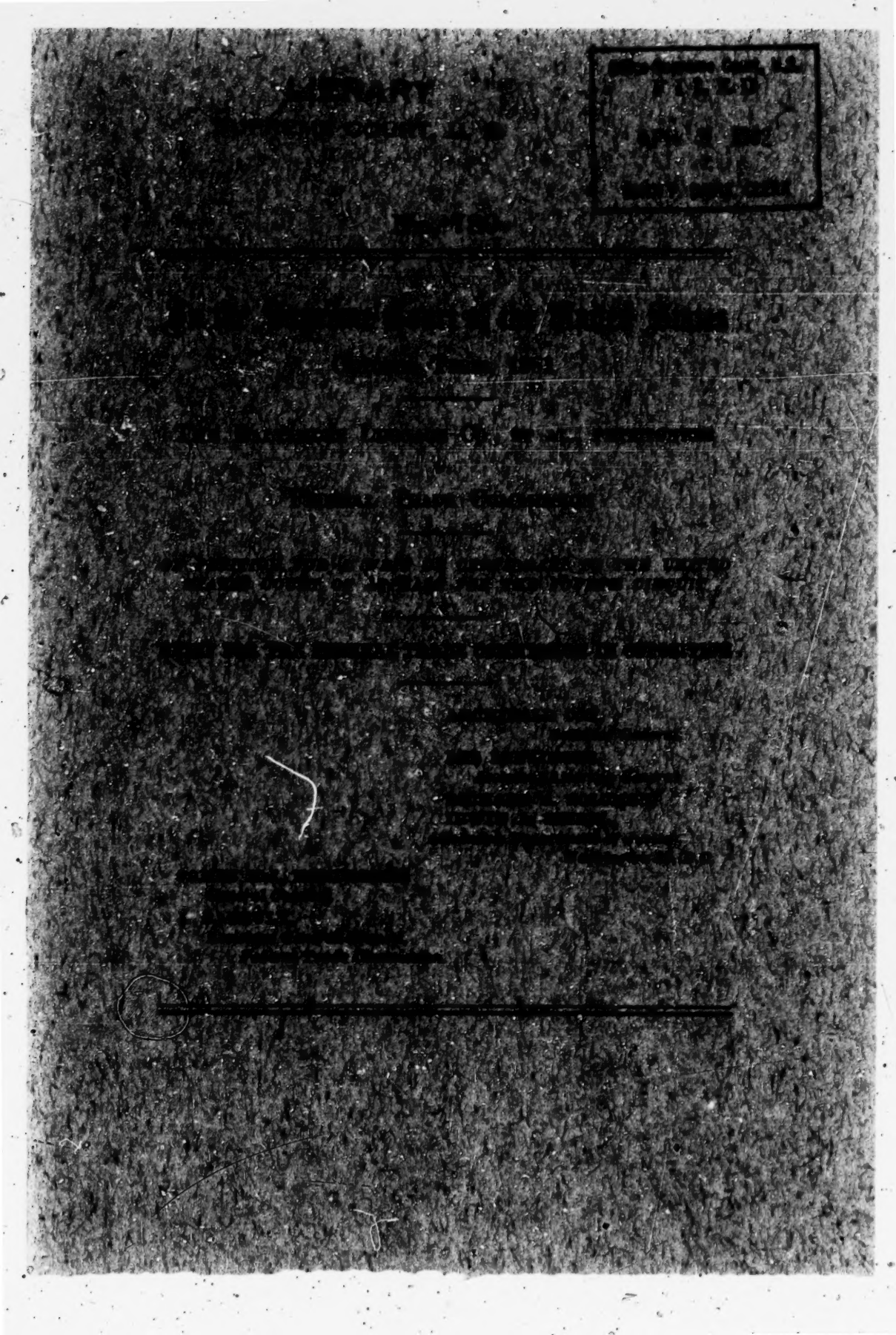

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 780

THE BALTIMORE LUGGAGE CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22–29) is reported at 296 F. 2d 608. The opinion of the Federal Trade Commission (Pet. App. 19–21) has not been officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30–31), affirming and enforcing the Commission's order, was entered on November 7, 1961. On February 3, 1962, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to March 7, 1962. The petition was filed on March 7.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a luggage manufacturer, whose product is sold nationally, engages in an unfair or deceptive practice in violation of the Federal Trade Commission Act by distributing its product with a price-tag which purports to give its usual and regular price when in fact the usual and regular price is substantially less in major trade areas accounting for 37½ percent of the manufacturer's business.

2. Whether, in the circumstances of this case, the Commission's cease and desist order was unduly burdensome.

STATUTE INVOLVED

Section 5(a) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45(a)) provides in part:

> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

Petitioners manufacture luggage which they sell direct to department stores and specialty stores throughout the country for resale to the public (R.

12).[2] Each piece of luggage is shipped to the retailers with a printed ticket or tag attached, which sets forth its purported retail price.[3] In general, retailers offer the luggage for sale without removing these price tags. A substantial proportion, however—accounting for 37½ percent of petitioners' total dollar sales volume—usually and regularly sell the luggage at prices approximately $2.00 below the ticketed price. Moreover, a number of those who customarily sell for less than the ticketed price also utilize colored display placards furnished by petitioners which set forth the same "list" price as appears on the printed price tags (Pet. App. 23–24; R. 23–24).

Petitioners were familiar with the retail prices at which their luggage was sold in their various retail outlets and knew that many of their retailers, particularly those in the New York, Philadelphia, Baltimore and Washington trade areas, had customarily been selling at approximately $2.00 below the ticketed price (R. 13–15, 16–17, 20–21, 49). Petitioners' Director of Sales and Advertising testified that "at no time do we permit [the retailers] to sell for less than a minimum" which he identified as approximately $2.00 below the ticketed price (R. 21).

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[1] "R." refers to petitioners' appendix in the court of appeals.

[2] The ticketed prices ranged from $12.50 to $21.95, depending upon the size of the luggage (Pet. App. 23–24).

[3] The examiner found that 387 of petitioners' 1276 retail dealers located in 12 states regularly and customarily sell this luggage approximately $2.00 below the price printed on the price tags. (R. 4b–4c; see Pet. App. 24). Petitioners maintain retail outlets in 46 states and the District of Columbia (R. 46).

After full hearings upon the Commission's complaint charging unfair or deceptive acts and practices in commerce (R. 1–3), the examiner found that in those areas in which petitioners' luggage customarily sold at prices lower than those printed on the price tags and display cards, petitioners' practice had the tendency of deceiving the public into believing that the luggage was being offered at a reduced price, *i.e.*, approximately $2.00 below the regular retail price of the merchandise (R. 4–4e). The examiner found further that this was in fact petitioners' purpose and that petitioners were "aware that [their] price tags were being used for deceptive purposes" (R. 4e). The examiner issued an order (R. 4e–4f) forbidding petitioners (1) to represent by preticketing or otherwise that a particular amount is the usual and regular retail price when such amount is in excess of that price in the trade areas where the representation is made, or (2) to furnish to others any means for misleading the public as to the usual and regular retail price of their merchandise. The examiner's initial decision and proposed cease and desist order were adopted by the Commission (Pet. 19–21). The court of appeals affirmed (Pet. 30–31).

ARGUMENT

The instant case was correctly decided below and presents no question of general importance in the administration of the Federal Trade Commission Act.

1. The Federal Trade Commission Act forbids "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices * * *" (Sec-

tion 5(a)(1)). Petitioners acknowledge that it is a violation of the Act for manufacturers to place tickets giving fictitious information on their products before delivering them to retailers (Pet. 5). *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483; *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838 (C.A. 7), certiorari denied, 368 U.S. 952. Petitioners also acknowledge, and the Commission found, that they preticket their luggage at a price which is approximately $2.00 in excess of the usual and regular retail price in many trade areas (including the New York, Philadelphia, Baltimore and Washington trade areas) which account for 37½ percent of their total dollar volume sales (Pet. App. 24; Pet. 5, 8).

Petitioners contend, however, that their preticketing practices (found to have been purposely aimed at deceiving the public) are beyond the reach of the Act because their products are "sold at retail *throughout the country*" (Pet. 6) and the prices on the tickets and display cards are the actual prices in more than a majority of the trade areas. They assert that the Commission must determine the usual and regular retail price—and therefore whether the price tags and display cards are fictitious—by surveying the entire national market and not by reference to particular trade areas in which their luggage is sold. But the Act does not so easily become a license for deceptive practices. The fact that petitioners' price tags and display placards were misleading and deceptive to a substantial proportion of retail customers, as found by the Commission (Pet. App. 20–21; R. 4c), is not

excused merely because the same tags and placards were not deceptive to the remainder of the retail customers. The relevant trading area for determining whether the pricing is deceptive is not the entire area in which the manufacturer sells, but rather the trading area in which the luggage purchaser, deceived by false implications of the price ticket, buys. Prices charged in distant markets to which he does not have access are of no significance.

Under petitioners' theory, their fictitious pricing practices, though widespread, "would have to be followed by their retail store customers in every section of the United States or * * * [at least] in more than 50 per cent of the market areas of the country before [petitioners] could be held to be in violation of the * * * Act" (R. 4c–4d). The hearing examiner aptly described such a contention as "absurd on its face" (R. 4d). The court of appeals likewise rejected this contention, holding that the Commission need not withhold its ban on a deceptive practice until it is shown "that the practice is not only widespread but universal" (Pet. App. 27).[4] This does not mean that a manufacturer ticketing his product with the price at which he believes it is sold generally violates Section 5 of the Federal Trade Commission Act whenever an isolated retailer cuts his price without removing the

[4] The above quotation is taken from a sentence in the court's opinion which is not accurately reproduced in the petition (Pet. App. 27). The sentence should read as follows (296 F. 2d at 611):

> No authorities have been cited to us, nor do we find any, which hold that, before the Commission may proscribe a deceptive practice on the part of a manufacturer which is widespread, it must be shown that the practice is not only widespread but universal.

ticket. But, at a minimum, where a seller knows, as the Commission found petitioners knew, that the retailers in important trade areas sell his goods at prices consistently below the ticketed price, he cannot excuse the deception on the grounds that in other areas the ticket price normally reflects the actual sales price.

Petitioners' practices are not excused by the argument that the price tags and display cards were merely good faith efforts to maintain the integrity of their product through suggested retail prices (Pet. 8–12). The short answer is that both tags and placards purported to give the actual—not the suggested—retail price and that the examiner found that petitioners' "purpose is self-evident—to make it appear to the store customer that the store was selling the luggage at approximately $2.00 less than the regular retail price" and that petitioners were "aware that [their] price tags were being used for deceptive purposes" (R. 46). The finding, adopted by the Commission, is supported by substantial evidence.[1]

---

[1] There is no substance to petitioners' argument (Pet. 10–12) based on the Automobile Information Disclosure Act, 72 Stat. 325, 15 U.S.C. 1231–1233, which requires automobile manufacturers to label each new car with detailed information concerning the car, including the manufacturer's suggested retail price for the car, for each accessory or item of optional equipment, and for the transportation costs. As the court of appeals pointed out, that Act "was enacted in the effort to remedy a situation peculiar to the automobile industry brought about by widespread fraudulent or deceptive practices principally indulged in by retailers" (Pet. App. 29). It does not support fictitious price pre-ticketing in other industries.

2. Petitioners' contention that the cease and desist order entered by the Commission imposes an unnecessary burden on them is without merit. As they note, the order does not forbid all price preticketing but "only such when the pre-ticketed price is in 'excess of the price at which such product is usually and customarily sold at retail in the trade area or areas where the representations are made'" (Pet. 12). Their objection to this language is that compliance with the order would require that they maintain a constant surveillance of the pricing activities of all their retail outlets across the country.[6] The testimony and documents offered by petitioners themselves show that they know the regular and usual retail prices at which their luggage is sold in the major markets and that they do maintain a constant surveillance of these prices (R. 49, 13–15, 16–17, 20–21). In any event, any additional burden of surveillance which the order adopted by the Commission may impose upon petitioners is well within the scope of its broad discretion to formulate a remedy adequate to prevent repetition of the deception which petitioners knowingly allowed to be perpetrated upon a large portion of the consumers of their products. *Federal Trade*

[6] Petitioners' extended quotation from the initial decision of the examiner in the *Regina Corp., et al.*, F.T.C. Docket No. 8323, November 16, 1961, now pending on appeal before the Commission, fails to point out that the examiner expressly distinguished the situation there from the one presented in this case. He stated (Mimeo. op., p. 2): "No element of preticketing, labeling or marking is involved in this case. (E.g., cf. *The Baltimore Luggage Company*, F.T.C. Docket No. 7683, aff'd. —— F. 2d —— (U.S.C.A. 4th Cir.), November 7, 1961."

Commission v. *Broch & Co.*, 368 U.S. 360, 364; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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